88-1526

Supreme Court, U.S.
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No. _____

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In The
SUPREME COURT of the UNITED STATES

October Term, 1989

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TERRY ROGERS AND
BRENDA ROGERS,

Petitioners,

v.

CITY OF CHEYENNE AND
CHEYENNE AIRPORT BOARD,

Respondents.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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DATE: March 15, 1989

## QUESTION PRESENTED

Whether a height limitation ordinance violates the "Taking Clause" of the Fifth Amendment when, without just compensation, application of the ordinance to a surface owner's property results in actual use, invasion and occupation by the public for a public purpose of the landowner's vested, useable airspace, forbids any use of the airspace by the landowner and causes actual damage?

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**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Tenth Circuit, which is the subject of this appeal, appears in Appendix A, at App 1., infra.

The Order Granting Motion to Dismiss by the United States District Court for

the District of Wyoming is not officially reported but is appended hereto as Appendix B, at App. 20, infra.

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## JURISDICTION

Terry Rogers and Brenda Rogers, petioners, file this petition for certiorari for review of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit which was entered on December 19, 1988, holding that, based upon previous rejections by this court of the question presented herein, it was bound to hold that petitioners' action was precluded.

This petition for a writ of certiorari is submitted to this court within 90 days of the entry of the final judgment below, and this court may review such judgment pursuant to 28 U.S.C. § 1254(1). Original jurisdiction in federal

court is grounded upon 28 U.S.C. § 1331 and 1343.

Since this case draws into question the constitutionality of a statute of the State of Wyoming and neither the State of Wyoming nor any agency, officer or employee of the State of Wyoming is a party, 28 U.S.C. § 2403(b) may be involved.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "... nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,

liberty, or property, without due process of law;

Wyo. Stat. 10-4-302 provides:

> The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath subject to the rights of flight described in W.S. 10-4-303.

Wyo. Stat. 10-4-303(a) provides:

(a) Flight in aircraft over the lands and waters of this state is lawful unless it is:

(i) At such a low altitude as to interfere with the existing use to which the land or water, or the space over the land or water, is put by the owner;

(ii) Conducted as to be imminently dangerous to persons or property lawfully on the land or water; or

(iii) In violation of the air commerce regulations promulgated by the Department of Transportation of the United States.

Section 3(2) of the Cheyenne Municipal Airport Zoning Ordinance provides:

> A noninstrument approach zone is established at each end of all noninstrument runways on the Cheyenne Municipal Airport for noninstrument landings and takeoffs. The noninstrument approach zone shall have a width of five hundred (500)

feet at a distance of two hundred (200) feet beyond each end of the runway, widening thereafter uniformly to a width of two thousand five hundred (2,500) feet at a distance of ten thousand two hundred (10,200) feet beyond each end of the runway, its centerline being the continuation of the centerline of the runway.

Section 4(2) of the Cheyenne Municipal Airport Zoning Ordinance provides in pertinent part:

> Except as otherwise provided in this ordinance, no structure or tree shall be erected, altered, allowed to grow, or maintained in any zone created by this ordinance to a height in excess of the height limit herein established for such zone. Such height limitations are hereby established for each of the zones in question as follows:
>
> * * * *
>
> (2) Noninstrumental approach zones: One foot in height for each forty (40) feet in horizontal distance beginning at a point two hundred (200) feet from and at the elevation of the end of the noninstrument runway and extending to a point ten thousand two hundred (10,200) feet from the end of the runway;...

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## STATEMENT OF THE CASE

This case involves the important question of whether an airport height limitation zoning ordinance, which provides a clear aerial approach to a public airport, is constitutionally valid when, without compensation, application of the ordinance permits actual public use, occupation and invasion of a landowner's reasonably useable and "vested" airspace, forbids use of the airspace by the landowner and causes actual damage.

Petitioners' home falls within the parameters of a municipal ordinance which restricts the height of structures and trees within the immediate vicinity of the airport. Upon petitioners' land was a large cottonwood tree which, when cut to conform with the ordinance, would be

destroyed, causing an actual loss of $2,064.00. The purpose of the ordinance is to allow public aircraft to fly through petitioners' airspace at an altitude of 25 feet.

After being commanded by municipal authorities to cut their tree, petitioners filed a declaratory judgment action in state district court requesting that the ordinance be declared unconstitutional as a "taking." The state district court held in petitioners' favor but, on appeal, the Wyoming Supreme Court reversed, holding that under the balancing test of Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) the ordinance did not have such an impact on appellants property, so as to constitute a "taking." Cheyenne Airport Board v. Rogers, 707 P.2d 717 (Wyo. 1985), appeal dismissed, ___U.S.___, 106 S.Ct. 1961, 90 L.Ed.2d

647(1986).

In the Jurisdictional Statement to this court in their direct appeal, pursuant to 28 U.S.C. 1257(2), the following question was presented:

> Whether the Cheyenne Municipal Airport Zoning Ordinance, which imposes height limitations for structures and trees within certain zones for the purpose of providing obstruction free non-instrument approach zones utilized for the landing and taking off of airplanes at a pubic airport, is an unconstitutional "taking" in violation of the "Taking Clause" of the Fifth Amendment to the United States constitution as applied to the states by the Fourteenth Amendment, where there is shown actual damage resulting from the use of the landowner's airspace for such public use?

This Court dismissed the appeal. Rogers v. Cheyenne Airport Board, 476 U.S. 1110(1986).

After seeking a variance from application of the ordinance, which had not previously been sought, petitioners brought this action pursuant to 42 U.S.C.

§ 1983 and 42 U.S.C. § 1988 alleging that the respondents' efforts to enforce the ordinance deprived and threatened to deprive them of their property by taking the same for a public use without just compensation and deprived them of their liberty in violation of the Fifth and Fourteenth Amendments. Petitioners also alleged that their right to due process of law had been deprived since the police power was being used to achieve the same result as a taking by eminent domain.

Petitioners sought declaratory, injunctive and monetary relief as well as attorney fees.

The federal district court granted respondent's Motion to Dismiss on the grounds that petitioners' action was barred by the doctrines of res judicata and collateral estoppel set forth in Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 481,66 L.Ed.2d 308 (1980) and Migra v. Warren

City School District Board of Education, 465 U.S. 75 (1984).

On appeal, the United States Court of Appeals for the Tenth Circuit held that regardless of whether the Wyoming Supreme Court's decision should be given preclusive effect under the circumstances, the petitioners' claims were barred by the prior decision of the Supreme Court dismissing the petitioners' appeal for lack of a substantial federal question since such a dismissal is a decision on the merits, citing Hicks v. Miranda, 422 U.S. 332, 344 (1975).

Thus, the court of appeals avoided the issue of res judicata and held that it was bound by the prior decision of this court dismissing a direct appeal. Thus, the question previously placed before this court is now, once again, squarely presented.

## REASONS FOR ALLOWING THE WRIT

### THERE IS A CONFLICT AMONG THE STATES REGARDING AN IMPORTANT QUESTION OF "TAKING" LAW AND A FEDERAL COURT HAS DECIDED THE QUESTION IN A MANNER IN CONFLICT WITH DECISIONS OF THIS COURT

The Wyoming Supreme Court, and now the Tenth Circuit Court of Appeals, have erroneously held to be constitutional an airport zoning ordinance, which, when applied to petitioners' property, requires them, without compensation, to permit public aviation through their enveloping airspace at an altitude of 25 feet, forbids them any use of that portion of their airspace and causes them actual damage. This the courts allow even though the ordinance permits actual invasion of property which is vested in petitioners by state law. See Wyo. Stat. § 10-4-302 and Cheyenne Airport Board, supra, p.722.

By virtue of this court's dismissal of petitioners' previous appeal on grounds

that it did not present a substantial federal question, the court of appeals has held, at least as applied to this case and all other cases with similar facts, that zoning ordinances which permit a physical invasion of private property and cause actual damage does not result a "taking."

This holding runs directly counter to previous decisions of this court holding that direct or indirect invasion of property by the public for a public purpose is a "taking." United States v. Causby, 328 U.S. 256, 123-128 (1946); Griggs v. County of Allegheny Pennsylvania, 369 U.S. 84 (1962); Nollan v. California Coastal Commission, ___U.S.___, 97 L.Ed.2d 677, 685, 107 S.Ct._____(1987).

It is also in direct conflict with the rule announced in Loretto v. Telepromptor CATV Corp, 458 U.S. 419, 434-435 (1982) where this court held that

where governmental action results in a permanent physical occupation "[a] taking has occurred without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Loretto, supra, 434-435. See also Nollan, supra.

This holding also conflicts with a plethora of state court decisions holding that airport height limitation ordinances, under similar circumstances, constitute a "taking." See e.g. Roark v. City of Caldwell, 394 P.2d 641 (Kd 1964); McShane v. City of Fairbault, 292 N.W.2d 283 (Minn. 1980). See also 8 AmJur 2d Aviation § 59, p.417; 18 ALR 4th, Zoning of Property Near Airport, p. 542.

The Wyoming Supreme Court decision, relied upon by the U.S. Court of Appeals, is in direct conflict with the decisions of this court and the decisions of several other state courts of last resort on an

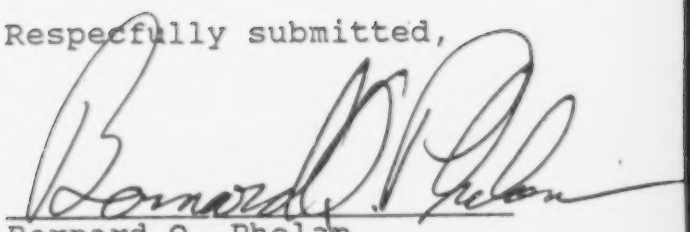
important point of federal "taking" law as well as being in conflict with several longstanding and recent Supreme Court decisions.

This case is not precluded by this court's previous dismissal as the prior matter may not have been "ripe" for review. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S.____, 105 S.Ct. 1381, 87 L.Ed.2d 1268 (1985). No such "ripeness" issue exists in this matter since petitioners have sought and have been denied a variance.

## CONCLUSION

This court should grant this petition on the question of whether the ordinance may effectuate a taking. If it finds that a "taking" may have occurred, it may remand on the issues of res judicata and collateral estoppel.

Respectfully submitted,



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**APPENDIX A**

TERRY ROGERS and
BRENDA ROGERS

Plaintiffs,

v.

CITY OF CHEYENNE and
CHEYENNE AIRPORT BOARD

Defendants

No. C86-0276-B

United States District Court
For the District of Wyoming

December 9, 1986

This matter came before the Court on defendant's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and for costs and attorney fees pursuant to Fed.R.Civ.P.11. The Court, having heard the arguments of counsel, having reviewed the pleadings, and being fully advised in the premises, FINDS and ORDERS as follows:

This is an action for monetary, injunctive and declaratory relief under 42 U.S.C. § 1983. Principles of full

faith and credit, res judicata and of equity, comity and federalism bar this action. The Court consequently grants defendant's motion to dismiss.

The City of Cheyenne adopted a municipal airport zoning ordinance in 1974. The purpose of the ordinance is to eliminate dangerous obstructions near the airport's runways and flight approaches. To achieve this goal, the ordinance restricted the height of structures and trees within a specified zone. Plaintiffs purchased residential property within the zone two years after enactment of the ordinance. The City later demanded that the plaintiffs comply with the zoning ordinance by trimming a large tree located on their property.

Plaintiffs filed an action in state court alleging that the ordinance took an easement in plaintiffs' airspace without just compensation in violation of the

fifth and fourteenth amendments to the United States Constitution, as well as provisions of the Wyoming Constitution. Wyoming's Supreme Court upheld the constitutionality of the ordinance, holding that plaintiffs lost no compensable airspace. Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 721 (Wyo. 1985), appeal dismissed, 90 L.Ed.2d 647 (1986). Plaintiffs appealed as of right to the United States Supreme Court. The Court dismissed for want of a substantial federal question. Rogers v. Cheyenne Airport Bd., 90 L.Ed.2d 647 (1986). Plaintiffs brought this action under 42 U.S.C. § 1983. They seek damages for alleged constitutional violations, an order enjoining enforcement of the ordinance, and a declaration that the ordinance unconstitutionally takes private property without just compensation.

Principles of full faith and credit, res judicata, and of comity, equity and federalism bar this case. Every court within the United States must give full faith and credit to judicial proceedings in other forums. 28 U.S.C. § 1738. The extent to which full faith and credit bars subsequent litigation depends on common law principles of res judicata. Halvey v. Halvey, 330 U.S. 610, 615 (1947). See generally Jackson, Full Faith and Credit -- The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1 (1945); Whitten, The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part 1), 14 Creighton L. Rev. 499 (1981). Res judicata precludes relitigation of claims and defenses that were raised or could have been raised in a prior proceeding. Allen v. McCurry, 449 U.S. 90, 94 (1980).

Collateral estoppel makes a prior determination of an issue binding in a subsequent proceeding by precluding relitigation of issues actually decided in an earlier action. Montana v. United States, 440 U.S. 147, 153 (1979). These doctrines apply in § 1983 actions. Allen v. McCurry, 449 U.S. at 105 (collateral estoppel applies to § 1983 actions); Migra v. Warren City School Dist. Bd. of Education, 465 U.S. 75, 85 (1984) (prior state court actions given res judicata effect in § 1983 actions). All of plaintiffs' claims in this action were raised or could have been raised in the state courts. The doctrine of res judicata therefore precludes plaintiffs' claims.

The doctrine's rationale supports this result. Res judicata is intended to relieve parties of the cost and vexation of multiple litigation, to conserve

judicial resources, to avoid inconsistent judgments and to end litigation. Montana v. United States, 440 U.S. 147, 153-54 (1979). This Court is the fourth in which defendants have been required to defend against plaintiffs' claims. Considerable judicial time has been expended in this process. Plaintiffs received several bites at the apple, and it is time to end this litigation.

Plaintiffs argue that res judicata should not apply in this case. First, they contend that the state courts lacked subject matter jurisdiction over this claim. Second, they urge that the state courts denied them a full and fair opportunity to litigate. The basis for each argument is a statement by the Wyoming Supreme Court noting that plaintiffs failed to seek a variance from the zoning ordinance. See Cheyenne Airport Bd. V. Rogers, 707 P.2d at 723,

732. Plaintiffs concede the accuracy of the court's statement but contend that their own failure to seek a variance deprived the state courts of jurisdiction and voided all proceedings in this case.

As authority they cite Williamson County Regional Planning Comm'n v. Hamilton Bank, 87 L.Ed.2d 126 (1985) (plurality opinion). In that case, the Court concluded that a landowner's failure to seek a variance from a zoning ordinance and to utilize procedures for obtaining just compensation rendered the landowner's claim not ripe for judicial review. Id. at 138, 139. Plaintiffs argue that, because they failed to seek a variance from the zoning ordinance, the case was premature and the Wyoming courts lacked jurisdiction.

A closer examination of Williamson shows, however, that plaintiffs' reliance on that case is misplaced. First,

Williamson is inapposite. That case was tried before a jury, which found that the landowner would be deprived of economic benefit from his land due to local land use regulations. The Court, however, reasoned that the failure to seek a variance showed that the decision of the local planning commission was not final. Therefore, the jury could not possible find that the landowner had been denied the reasonable use of its property. Id. at 142, 143. In contrast, the Wyoming Supreme Court held that plaintiffs had not been deprived of a compensable property interest. Cheyenne Airport Bd. v. Rogers, 707 P.2d at 725. Whether or not plaintiffs sought a variance is irrelevant to the determination that they possessed no property interest. Unlike Williamson this action presented a concrete case of final governmental action.

Second, Wyoming does not fully accept federal justiciability doctrines. See Keiter, An Essay on Wyoming Constitutional Interpretation, 21 Land & Water L. Rev. 527, 533-35 (1986). Williamson was tried in a federal court. Federal courts are courts of limited jurisdiction subject to the case or controversy limitations of Article III of the United States Constitution. Federal courts may only adjudge rights of litigants involved in actual controversies. Valley Forge Christian College v. American United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). In contrast, state courts are not bound by the case or controversy requirements of Article III absent some analogous state constitutional provision. Instead of the enumerated cases or controversies of Article III, the Wyoming appellate and district are courts of general jurisdiction over all "causes

both at law and in equity." Wyo. Const. art. 5, §§ 2, 10. Moreover, Wyoming's view of justiciability is broader than Article III. Wyoming, for example, excepts matters of sufficient public importance from the mootness doctrine. Washakie County School Dist. No. One v. Herschler, 606 P.2d 310, 318 (Wyo. 1980), cert. denied sub. nom. Hot Springs County School Dist. No. One v. Washakie County School Dist. No. One, 449 U.S. 824 (1980). C.f. Defunis v. Odegaard, 416 U.S. 312, 316 (1974) (federal mootness doctrine does not recognize a "public importance" exception). The Wyoming courts also have conferred taxpayer standing in the face of contradictory federal precedent. Spriggs v. Clark, 14 P.2d 667, 668 (Wyo. 1932). C.f. Frothingham v. Mellon, 262 U.S. 447 (1923) (denying taxpayer standing). Finally, the Wyoming court has not used politically sensitive cases to

read a political question doctrine into the state constitution. See Brimmer v. Thompson, 521 P.2d 574 (Wyo. 1978); Washakie County School Dist. No. One v. Herschler, 606 P.2d 310, 318 (Wyo. 1980), cert. denied, 449 U.S. 824 (1980). C.f. Baker v. Carr, 369 U.S. 186 (1962). For these reasons, the Court concludes that the Wyoming Supreme Court did possess jurisdiction and that its holding is entitled to full faith and credit.

Plaintiffs argue, however, that res judicata still cannot apply, because the state courts denied them a full and fair opportunity to litigate. They assert that the Wyoming Supreme Court's observation that plaintiffs failed to seek a variance was not supported by any evidence in the record or raised in counsel's briefs or arguments. Plaintiffs contend that the Wyoming court's statement denied them due process of law. This argument is

meritless.

First, the Wyoming Supreme Court's comment is harmless. Plaintiffs' counsel admitted the truth of the statement in oral argument before this Court. Plaintiffs are thus in the awkward position of contending that they were prejudiced by the truth. Moreover, the statement had an inconsequential effect on the outcome of the case. The Wyoming court simply did not rely on this fact in concluding that plaintiffs lost no compensable airspace.

Second, plaintiffs were not denied a full and fair opportunity to litigate. Res judicata may be inappropriate where a party was denied a fully and fair opportunity to litigate in the state courts. Allen v. McCurry, 449 U.S. at 101; Haring v. Prosise, 462 U.S. 306, 313 (1983). The courts must consider whether state substantive law is facially invalid

or whether state procedural law frustrates constitutional litigation. Allen v. McCurry, 449 U.S. at 100-101. Scholars point to several additional factors the courts should weigh. First, state issue and claim preclusion rules should apply if the § 1983 plaintiff initially selected a state forum. In such cases, giving res judicata effect to prior state court judgments does not frustrate the intent of § 1983. The second factor is whether relitigation in the federal courts undermines respect for state court judgments. Denying preclusive effect to earlier state court judgments may be appropriate where § 1983 litigation presents new claim or issues in the federal courts or where the federal constitutional issues were tangential to the state court proceedings. A third consideration is whether the state courts adequately and fairly considered the

federal issues. Giving res judicata effect to a state court constitutional decision may be inappropriate if the state court had an institutional interest in the outcome of the litigation or if the § 1983 litigation relates not to the issue originally in dispute but to the process by which the state court decision was reached. Fourth, claim preclusion is justified where the state court did not apply federal law to factual issues. Finally, preclusion may be appropriate where the remedy sought in federal court is substantially the same as that sought in the state courts. See, Smith, Full Faith and Credit and Section 1983: A Reappraisal, 63 N.C.L. Rev. 59, 112-17 (1984); McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims (Part II), 60 Va. L. Rev. 250, 276-77 (1974); Tork, Res Judicata in Federal Civil Rights Actions

Following State Litigation, 9 Ind. L. Rev. 543, 561-68 (1976); Vestal, State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court, 27 Okla. L. Rev. 185, 187-211 (1974).

This is not a case of a party haled into court, forced to litigate constitutional claims against his will, or compelled without his consent to accept the state courts' determination of those claims. Plaintiffs chose to litigate in the state courts. They proceeded through each level of the Wyoming courts and to the United States Supreme Court. Their appeal to that Court was dismissed for want of a substantial federal question. Plaintiffs now urge this Court to declare those proceedings nugatory or to embark on its own appellate review of the Wyoming Supreme Court's decision. Plaintiffs are shopping for a new forum after losing in state court and before the United States

Supreme Court. Claim preclusion is appropriate in these circumstances.

Other reasons justify applying res judicata. This Court would undermine the judgment of the Wyoming Supreme Court by providing, in effect, an appellate forum for plaintiffs' claims. New claims or issues are not presented by the § 1983 litigation. Nor were the federal constitutional issues tangential to the state court proceedings. Second, the state courts adequately and fairly considered the federal issues. They possessed no institutional interest in the outcome of the litigation. The instant litigation does not challenge the state court's decision-making process. It raises the same issues originally in dispute. Third, the remedy sought in federal court is substantially the same as the remedy sought in the state courts.

Finally, principles of comity, equity and federalism require dismissal of this action. See Younger v. Harris, 401 U.S. 37, 43-44 (1971). The Constitution obligates the state courts to uphold federal law. Allen v. McCurry, 449 U.S. at 105. This Court has no reason to assume that they failed to do so in this case. The co-equal positions of the state and federal courts is "one of the happy incidents of the federal system." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting). Comity and federalism indicate that the Court should abstain from deciding plaintiffs' claims. Equity dictates the same result. Plaintiffs acquired their property two years after the airport zoning ordinance was enacted. They therefore had ample notice of the ordinance and its effect on their property. Plaintiffs' tree may endanger

air traffic. In the interest of public safety the Court must be guided by the policy of ending litigation.

Defendants also seek costs and attorney fees. They urge that plaintiffs' claim is groundless and unwarranted by existing law or a good faith argument for the extension, modification or reversal of existing law. This action, however, raises complex issues concerning the interaction between state and federal courts. These problems are not susceptible to ready determination, and the Court cannot find that the claim was totally unwarranted or interposed merely to harass. It is therefore

ORDERED that the defendants' motion to dismiss be, and the same here is, granted and all of plaintiffs' claims against the City of Cheyenne and the Cheyenne Airport Board are hereby dismissed. It is further

ORDERED that defendants' motion for costs and attorney fees be, and the same hereby are, denied.

DATED this 9th day of December, 1986.

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**APPENDIX B**

TERRY ROGERS AND BRENDA ROGERS
Plaintiffs-Appellants

v.

CITY OF CHEYENNE AND
CHEYENNE AIRPORT BOARD
Defendants-Appellees

No. 87-1099

United States Court of Appeals
For the Tenth Circuit

December 19, 1988

Before LOGAN, BRORBY, and LEAVY,* Circuit Judges.

*The Honorable Edward Leavy, Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

The plaintiffs-appellants appeal the district court's order of December 9, 1986, dismissing the plaintiffs' claims against the defendants-appellees, City of Cheyenne and Cheyenne Airport Board. The plaintiffs commenced the underlying action pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988. They alleged that the defendants' attempts to enforce an ordinance which restricted the height of structures and

trees on their property, which was located near the municipal airport, deprived and threatened to deprive them of their property by taking the same for a public use without just compensation and deprived them of their liberty in violation of the fifth and fourteenth amendments. The plaintiffs also asserted that the defendants had deprived them of their right to due process by seeking to use the police power to achieve the same result as taking by eminent domain.

The plaintiffs sought a declaratory judgment that the ordinance was unconstitutional as applied to their property, and injunction against enforcement of the ordinance through criminal prosecution or other means, damages, and their attorney's fees and costs.

The defendants moved to dismiss the action pursuant to Fed. R. Civ. P.

12(b)(6) on the grounds of res judicata. The defendants asserted that the plaintiffs had already litigated their claims in state court, see Cheyenne Airport Board v. Rogers, 707 P.2d 717 (Wyo. 1985), appeal dismissed, 476 U.S. 1110 (1986), and could not relitigate them in federal court. The defendants submitted seven exhibits with their brief in support of their motion to dismiss, consisting of various pleadings and briefs filed with the Wyoming Supreme Court and the United States Supreme Court, as well as those courts' decision, in the prior action.

Before reaching the merits of the appeal, we must initially determine whether or not the district court committed reversible error by considering matters outside the pleadings without giving the parties notice pursuant to Fed. R. Civ. P. 12(b)(6). When a party moving

to dismiss an action for failure to state a claim submits matters outside the pleadings, the court must either exclude them or treat the motion as one for summary judgment and, after giving the parties notice of the court's intent to so convert the motion, dispose of it pursuant to Fed. R. Civ. P. 56. Nichols v. United States, 796 F.2d 361, 364 (10th Cir. 1986).

The district court's opinion explicitly refers to the published opinion of the Wyoming Supreme Court and that of the United States Supreme Court. Consideration of published opinions of other courts does not necessitate notice to the parties pursuant to Fed. R. Civ. P. 12(b)(6). See Mack v. South Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986); 2A J. Moore, J. Lucas & G. Grother, Moore's Federal Practice paragraph 12.07[2.-5], at 12-68 (2d ed.

1987). Consideration of the other materials submitted, however, would trigger the notice requirement of Fed. R.Civ. P. 12(b)(6).

A court's failure to give notice pursuant to Fed. R. Civ. P. 12(b)(6) does not constitute reversible error in all instances, however. For instance, some circuits have held that a court need not give the parties prior notice of a conversion to summary judgment where no potential disputed material issues of fact exist. See Lien Ho Hsing Steel Enter. Co. v. Weihtag, 738 F.2d 1455, 1461 (9th Cir. 1984); Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 391 (7th Cir.), cert denied, 454 U.S. 838 (1981). This court has previously held that when the nonmoving party makes no objection to the submitted materials and responds with its own materials, the failure to give notice of a summary

judgment conversion does not constitute reversible error. Nichols, 796 F.2d at 364.

In the present action, the plaintiffs did not specifically object to the matters presented to the court by the defendants with their brief, and the record reveals that in oral argument before the district court, the plaintiffs relied upon the documents submitted to support their own position that the action should not be barred by previous litigation. We also note that the plaintiffs have not raised any argument on appeal regarding the district court's consideration of matters that were outside the pleadings. We therefore conclude that the district court did not err in considering those documents submitted to it by the defendants with their brief in support of their motion to dismiss.

Since the court did consider matters outside the pleadings, however, we must review the record under summary judgment standards. See id. Our standard of review of a grant of summary judgment is well settled; we review such decisions de novo. Ewing v. Amoco Oil Co., 823 F.2d 1432, 1437 (10th Cir. 1987); Carey v. United States Postal Serv., 812 F.2d 621, 623 (10th Cir. 1987). Furthermore, "we may affirm the granting of summary judgment if any proper ground exists to support the district court's ruling." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988).

The district court, below, determined that the decision of the Wyoming Supreme Court in the prior action should be given preclusive effect in the present action and, therefore, granted the defendants' motion. Based upon our review of the record, we conclude that regardless of

whether the Wyoming Supreme Court's decision should be given preclusive effect under the circumstances presented here, the plaintiffs' claims are barred by the decision of the United States Supreme Court dismissing the plaintiffs' appeal for lack of a substantial federal question, which is binding on all lower courts.

A dismissal for lack of a substantial federal question, like a summary affirmance, is a decision on the merits.[1] See Hicks v. Miranda, 422 U.S. 332, 344 (1975). Although the United States Supreme Court does not give summary dispositions a much weight as decisions rendered upon plenary review, nonetheless, the dispositions are binding on the lower

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[1] The United States Supreme Court's practice is to affirm a judgment of a lower federal court and to dismiss an appeal from a state court. 12 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice paragraph 400.05--1, at 4-20 (2d ed. 1988).

courts until such time as the Supreme Court informs them otherwise. Id. at 344-45.

In Mandel v. Bradley, 432 U.S. 173, 176 (1977)(per curiam), the Court further explained the precedential effect of a summary disposition.

> Summary affirmances and dismissals for want of a substantial federal question without a doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.

This court has recognized the binding effect of summary dispositions on lower courts, "at least where substantially similar issues are presented." Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490, 495 (10th Cir. 1983), rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984). In

order to determine whether a summary dismissal of a similar case was binding on the court in the action before it, this court looked at the jurisdictional statement submitted to the Supreme Court and the arguments advanced in support thereof to see whether they raised substantially similar issues. Id. at 496-97.

The plaintiffs' jurisdictional statement to the United States Supreme Court in Rogers v. Cheyenne Airport Board set forth the question presented on appeal as follows:

> Whether the Cheyenne Municipal Airport Zoning Ordinance, which imposes height limitations for structures and trees within certain zones for the purpose of providing obstruction free non-instrument approach zones utilized for the landing and taking off of airplanes at a public airport, is an unconstitutional "taking" in violation of the "Taking Clause" of the Fifth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment, where there is shown actual damage

> resulting from the use of the landowner's airspace for such public use.

In dismissing the plaintiffs' appeal, the United States Supreme Court necessarily rejected the foregoing constitutional challenge presented by the plaintiffs. We lower courts are bound by that rejection, and we cannot now hold that the ordinance in question did, in fact, effect a taking of the plaintiffs. property. Since the plaintiffs cannot prevail on their taking claim, they also cannot prevail on their due process claim, which requires an initial determination that the defendants' exercise of the police power effected the same result as a taking by eminent domain. The plaintiffs have already sought review of their claims in the highest court in the land and they must abide by that Court's decision.

The defendants have requested in their brief on appeal that this court impose sanctions against the plaintiffs for filing an allegedly frivolous appeal. We do not find this case to be an appropriate one for the imposition of sanctions. The defendants' motion for sanctions is DENIED.

The judgment of the United States District Court for the District of Wyoming is AFFIRMED.

The mandate shall issue forthwith.

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1526

In The

# Supreme Court of the United States

October Term, 1988

TERRY ROGERS and BRENDA ROGERS,

*Appellant,*

v.

CHEYENNE AIRPORT BOARD
and CITY OF CHEYENNE,

*Appellees.*

**On Appeal For A Writ Of Certiorari From The Decision Of The United States Court Of Appeals For The Tenth Circuit**

## APPELLEES BRIEF IN OPPOSITION TO THE PETITION

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## QUESTION PRESENTED

The question in this case is whether or not there exist reasons pursuant to Rule 17 of the Supreme Court Rules to grant certiorari in a case that has been twice previously heard and decided by the Supreme Court of the United States of America.

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Pursuant to Rule 22, the appellees, Cheyenne Airport Board and the City of Cheyenne, file this their brief in opposition to the Petition for a Writ of Certiorari filed by Terry Rogers and Brenda Rogers on the ground that the appeal does not present a reason pursuant to Rule 17 justifying a review by this Court of the decision of the Tenth Circuit Court of Appeals as this case has previously been decided by the United States Supreme Court and, therefore, the reasons set forth in Rule 17 are not found.

## STATUTORY PROVISIONS INVOLVED

The statutory provisions with regard to the underlying matters are contained in the appellants brief and are not herein enumerated as it is the position of appellee that they do not address the issue of grounds for accepting this case pursuant to Rule 17. It is the position of appellee that in the Petition for Writ of Certiorari the question is whether or not grounds exist justifying a review of the decision. It is, therefore, those grounds that are germain and not the underlying issues in a case that was dismissed by the Tenth Circuit as being precluded by the doctrines of res judicata.

## STATEMENT

On April 12, 1984, Terry Rogers and Brenda Rogers brought an action in the First Judicial District Court of the State of Wyoming, praying that the Cheyenne Municipal Airport Zoning Ordinance be declared unconstitutional under the provisions of Article I, Section 7 of the

Wyoming Constitution and the Fifth and Fourteenth Amendments to the United States Constitution and for an injunction preventing enforcement of the ordinance. This Petition for Writ of Certiorari follows a long and tortured path of litigation which has resulted from that initial filing. The initial filing resulted in an appeal to the Supreme Court of the State of Wyoming in *Cheyenne Airport Board v. Rogers*, 707 P.2d 717 (Wyo. 1985). That decision was adverse to the Rogers and was then appealed to the United States Supreme Court and was dismissed at that level for lack of a substantial federal question at 476 U.S. 110, 106 S. Ct. 1961, 90 L.Ed.2d 647 (1986).

Not satisfied with the decision of the United States Supreme Court, the appellant continued to refuse to trim the Cottonwood tree, which is the subject of this entire litigation. The City of Cheyenne, pursuant to its zoning ordinance, therefore, prosecuted appellants pursuant to the Cheyenne Municipal Airport Zoning Ordinance. That left a trail of litigation again culminating with a dismissal before the United States Supreme Court.

Once again, appellants being unsatisfied with the decision of the United States Supreme Court sought redress in the Federal Court system by filing a § 1983 case with the United States District Court for the District of Wyoming which is the genesis of this appeal. The Federal District Court dismissed the action finding the previous decision of the United States Supreme Court to be res judicata. The case was then appealed to the Tenth Circuit, case #87-10099. The Tenth Circuit, on December 9, 1988, affirmed the decision of the United States District Court from which this petition resulted.

## ARGUMENT

### THIS CASE DOES NOT PRESENT A REASON PURSUANT TO RULE 17 JUSTIFYING ACCEPTANCE OF THE PETITION FOR WRIT OF CERTIORARI.

The petitioner attempts to create a Rule 17 reason by expanding the previous ruling beyond its scope. The petitioner says "the Court of Appeals has held, at least as applied to this case and all other cases with similar facts, that zoning ordinances which permit a physical invasion of private property and cause actual damages does not result a 'taking' ". That is an absolute misstatement of the holdings of the previous courts. In fact, the underlying decision from the Supreme Court of the State of Wyoming found that there was no taking as damage had not been shown pursuant to and under the guidelines of the previous Supreme Court cases. *See United States v. Causby*, 328 U.S. 256, 266 (1946), *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84 (1962). None of the courts that have heard this case have attempted to expand it beyond its own parameters. As must be the case in all zoning questions, the resolution of the issue of a taking must be done on a case by case basis. That was done in the initial litigation and this Court has already reviewed that issue as the State of Wyoming Supreme Court case which so decided was reviewed by this Court and dismissed for lack of a substantial federal question. *Cheyenne Airport Board v. Rogers*, 707 P.2d at 717 (Wyo. 1985), appeal dismissed, 476 U.S. 110, 106 S.Ct. 1061, 90 L.ED.2d 647 (1986). Therefore, the petitioner has attempted to expand the decisions of the various previous courts beyond their scope in an effort to find the reason to justify acceptance under Rule 17. However, this attempted expansion does not change the rulings which are attached to the petition,

which on their face do not take the issues between the parties to the scope argued by the petitioners.

The petitioners further argue that their failure to apply for a variance protects them from the previous decision of this Court as the issues were not right at the time they were heard in the previous litigation before the United States Supreme Court. This argument is unfounded as that issue was before the United States Supreme Court in the previous litigation and it does not provide a reason for granting a Writ of Certiorari pursuant to Rule 17.

## CONCLUSION

The United States Supreme Court should not grant the Petition for Writ of Certiorari as reasons do not exist pursuant to Rule 17 for granting the same. The petitioners attempted expansion of the rulings of the United States District Court and Tenth Circuit are not justified by the decisions themselves and there is no conflict between this and other decisions which would warrant granting of the writ. The petition should be denied.

Respectfully submitted,

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